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No. 82-195

IN THE

# Supreme Court of the United States

October Term, 1982

VAN D. MUELLER and JUNE NOYES,
*Petitioners,*

vs.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOSLEEN A. FUJAN, BRENDA B. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
*Respondents.*

## MOTION FOR LEAVE TO FILE BRIEF OF AN *AMICUS CURIAE* AND BRIEF OF AN *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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The Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Association of Metropolitan School Districts and Minnesota Association of School Business Officials (herein collectively "Minnesota *Amicus Curiae*") pursuant to Rule 36, Rules of the Supreme Court of the United States, respectfully move this Court for leave to file the accompanying brief in this case as *Amicus Curiae* in support of petitioners. In support of this motion the Minnesota *Amicus Curiae* submit the following:

1. The Minnesota Association of School Administrators ("MASA") is an organization of 639 public elementary and secondary school administrators. The MASA has representatives from virtually all of the 437 Minnesota school districts.

2. The Minnesota Association of Secondary School Principals ("MASSP") is an organization of approximately 1100 secondary school principals. The MASSP's membership is open to all Minnesota secondary school principals and while predominantly consisting of public school principals includes principals from sectarian and non-sectarian private schools.

3. The Association of Metropolitan School Districts is an organization of 30 independent and joint intermediate suburban public school districts located in the 7 county Minneapolis/St. Paul metropolitan area.

4. The Minnesota Association of School Business Officials is an organization comprised of 336 active members. The membership includes business managers, school superintendents, accountants and operations supervisors from 138 Minnesota school districts involved in the business affairs of their respective school districts.

5. A goal of each of the Minnesota *Amicus Curiae* is to promote the general educational programs of the Minnesota public schools through leadership in the educational and decision-making processes and to be an unbiased professional advocate for the individual educational needs of children and youth in the state of Minnesota. Towards these ends the Minnesota *Amicus Curiae*, along with others, on March 23, 1981 issued a policy statement (Attached as

Exhibit A) opposing income tax devices which tend to divert public funds to nonpublic school systems.

6. The Minnesota *Amicus Curiae* have been active on the national, state and local levels in examining the problems of public education. The Minnesota *Amicus Curiae* believe that the integrity and quality of public education will be jeopardized if the decision of the Court of Appeals were affirmed. In contrast, neither petitioners nor respondents are advocates having a direct interest in public education in Minnesota as do the Minnesota *Amicus Curiae*. Under such circumstances there are facts and questions of law that will not be adequately presented by the parties.

7. The Minnesota *Amicus Curiae* have received the consent of the petitioners, but have been denied the consent of the respondents to the filing of their *Amicus Curiae* Brief.

WHEREFORE, the Minnesota *Amicus Curiae* respectfully requests that it be permitted to file its *Amicus Curiae* Brief in this action.

Dated: _____.

STOLPESTAD, BROWN & SMITH
Professional Association

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## EXHIBIT A

## JOINT STATEMENT IN OPPOSITION TO TUITION TAX CREDITS, INCOME TAX DEDUCTIONS, AND/OR VOUCHERS

The American public school system—the greatest endeavor to educate the masses in the history of mankind—is in serious jeopardy. Continuing efforts to divert revenue from public elementary-secondary schools is cause for alarm.

Federal/state government directions in public education seeks to assure the principles of equal opportunity, nondiscriminatory programs and practices, openness, due process, and adherence to the doctrine of separation of church and state. The idea that a competitive educational system will solve the problems confronting public schools has been espoused by some. In light of the few legislative mandates governing nonpublic schools, it hardly seems reasonable to expect the public schools to compete when the rules are not the same. Further, diverting funds from the public schools in support of a competitive system will not improve the public education system.

The public school system is necessary to the continued success of our democratic society. The basic premise upon which the public school system is founded, equal opportunity, is the cornerstone of democracy. Nonpublic elementary-secondary education will remain as an alternative to the individual. However, diverting desperately needed revenue from public education to support nonpublic schools is an overt statement of a lack of confidence in the education system whose very existence, structure, and operation can be credited to some of those who now wish to abandon it, i.e., Congress, Legislature.

The Minnesota Legislature and the United States Congress in coordination with local school boards have made tremendous strides in developing a public school system which

now more effectively than at any time in our history comes closer to providing our ultimate goal of equal education. A negative reaction to the efforts of the Congress and Legislature to guarantee equal opportunity in public schools has resulted in an increase in the number of nonpublic schools in the United States.

Efforts to technically circumvent the concept of separation of church and state by public financing of any services to nonpublic schools, in fact, violates that concept. At a time when religious activity is being judicially removed from public school it is inconsistent for the Legislature and Congress to be entertaining the idea of channeling billions of public tax dollars to support nonpublic schools, most of which are religious institutions.

It is urgent that all organizations and citizens who cherish public education unite for the purpose of defeating federal and state attempts to further divert funding from the public school system to a nonpublic school system through tuition tax credits, income tax deductions, and/or voucher systems.

* * * * *

This position statement was prepared by representatives from the following organizations:

Association of Metropolitan School Districts
Minnesota Association of School Administrators
Minnesota Association of Secondary School Principals
Minnesota Association of School Business Officials
Minnesota Education Association
Minnesota Elementary School Principals Association
Minnesota Federation of Teachers
Minnesota School Boards Association
Retired Educators Association of Minnesota

If further information is needed, please contact Norm Maguire, Executive Director, MASA 224-1828.

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*Respondents.*

---

## BRIEF OF THE MINNESOTA ASSOCIATION OF SCHOOL ADMINISTRATORS, MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, ASSOCIATION OF METROPOLITAN SCHOOL DISTRICTS AND MINNESOTA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS, *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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### INTEREST OF THE *AMICUS CURIAE*

The Minnesota Association of School Administrators, Minnesota Association of Secondary School Principals, Association of Metropolitan School Districts and Minnesota

Association of School Business Officials (herein collectively "Minnesota *Amicus Curiae*") respectfully request this Court to reverse the decision of the Eighth Circuit Court of Appeals in this case. The Minnesota *Amicus Curiae* have been active, unbiased, professional advocates of public education on national, state and local levels. The Minnesota *Amicus Curiae* believe that the statute involved in this case violates the doctrine of separation of church and state. The effect of such a statute is to pit public and parochial schools against each other for public funds. This has been the experience in Minnesota under such laws. Affirmance of the Eighth Circuit's opinion will further aggravate this situation.

## QUESTION PRESENTED FOR REVIEW

Whether the challenged statute, Minn. Stat. §290.09 (22) (1978), which provides a state income tax deduction for certain expenses, including tuition, for the education of children attending elementary and secondary schools, and whose benefits flow overwhelmingly to parents of children attending parochial or religious affiliated nonpublic schools violates the Establishment Clause of the First Amendment to the United States Constitution.

## CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, or to petition the government for a redress of grievances.

## STATUTE INVOLVED

The statute involved is part of the Minnesota income tax statutes, entitled "Income and Excise Taxes", Minn. Stat. C. 290, §290.09. Subdivision 22, relating to deductions from gross income, reads as follows:

> Subd. 22. Tuition and transportation expense. The amount he has paid to others. not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12. for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

## SUMMARY OF ARGUMENT

The constitutionality of the Minnesota income tax deduction involved in this case is clearly controlled by *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413

U.S. 754 (1973). Contrary to *Nyquist*, the Eighth Circuit made a purely facial analysis, thus failing to apply the "primary effect" test required by the Establishment Clause. Had the Eighth Circuit examined the actual impact of the tuition deduction, it would have reached a contrary conclusion. The correct decision was reached by the First Circuit in 1980 when it was confronted with an identical statute and facts. *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980).

If, on the other hand, the Supreme Court shares the concern voiced by the trial court over the adequacy of the factual records, summary judgment was improvidently granted. Serious consideration, then, should be given to remanding the entire matter for an evidentiary hearing.

## ARGUMENT

### A. INTRODUCTION

The central issue is whether the Minnesota income tax deduction is constitutionally acceptable under the Establishment Clause of the First Amendment to the United States Constitution. In view of the record, as it now stands on appeal, the challenged statute clearly is controlled by *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 754 (1973). *Nyquist* held unconstitutional certain New York tax credits and deductions for educational expenses, the benefit of which inured primarily to parents sending their children to parochial schools. Likewise, Minn. Stat. §290.09(22) (1982), authorizing a deduction from gross income for tuition, textbooks, and transportation expenses incurred on behalf of dependents attending elementary or secondary schools, unquestionably inures principal-

ly to the benefit of those parents who send their children to nonpublic, sectarian schools. The primary effect is the impermissible subsidy of religious education by the state of Minnesota.

The Eighth Circuit's equivocal attempt to distinguish the decisions of the First Circuit in *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980) and the Third Circuit in *Public Funds for Public Schools of New Jersey v. Byrne*, 590 F.2d 514 (3rd Cir. 1979) is simply unconvincing. In particular, *Norberg* was based on a statute and facts indistinguishable from the Minnesota statute challenged in the present case. *Mueller v. Allen*, 676 F.2d 1195, 1200 (8th Cir. 1982). In *Byrne* and *Norberg* the courts found no basis for distinguishing this Court's decision in *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756 (1973) which held certain education expense tax credits and deductions unconstitutional as violative of the Establishment Clause.

The statistical proof offered by the petitioners demonstrates the effective application of the tax deduction. Tuition constitutes the bulk of the deductions under the challenged statute. Minnesota, with very few exceptions, does not charge tuition for public elementary and secondary education. Only 79 Minnesota school children paid tuition to attend public schools during the 1978-79 school year and only 40 the previous school year. Petition for Writ of Certiorari, pp. 3-4.

Nonpublic education, of course, is not free; parents must pay tuition for their children to attend private schools. The petitioners introduced evidence supplied by the respondents that for the school years 1978-79 and 1979-80 more than 95% of the children attending private schools in Minne-

sota attended schools considering themselves to be sectarian. *Mueller v. Allen*, 514 F.Supp. 998, 1001 (1981). Undeniably, the overwhelming portion of taxpayers qualifying for benefits from the challenged tax deduction do so by reason of tuition paid to religious affilated schools.

### B. THE EIGHTH CIRCUIT FAILED TO APPLY "PRIMARY EFFECT" TEST.

Since *Walz v. Tax Commissioner*, 397 U.S. 664 (1970), this Court has applied a three-pronged test of constitutionality under the Esablishment Clause. Under that test, governmental action is impermissible if (1) its purpose is the advancement or inhibition of religion, or (2) its principal effect is the advancement or inhibition of religion, or (3) it fosters excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) and *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756, 772-3 (1973). The inconsistency among the Circuits revolves around their respective applications of the primary effect part of this test. The Eighth Circuit not only adopted an inconsistent position, but virtually eliminated the primary effect part from the tripartite test.

Through a purely facial analysis, the Court of Appeals relied solely on the fact that the Minnesota statute appears neutral on its face. The Court ignored the practical and obvious effect of this statute. Judgment must turn on whether particular acts have "the effect" of the establishment or interference with religious beliefs and practices. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970) and *Committee for Public Ed. and Religious Lib. v. Nyquist*, 413 U.S. 756, 774 (1973).

Confronted by an identical statute and similar facts, the

First Circuit examined the actual impact of the tuition deduction. Specifically, that Court of Appeals, in a well-reasoned, unequivocal and straightforward manner, found that the primary effect of the tax deduction was the advancement of religion. *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855, 860 (1980). The First Circuit, although recognizing the facial neutrality of the statute, rightfully concluded that the more important question is its primary effect. *Norberg*, 630 F.2d at 858-9. The Eighth Circuit even acknowledged such an effect:

> [W]e are concerned with the fact that we are dealing with an indirect state subsidy of tuition which can be viewed "as an incentive to parents to send their children to sectarian schools, or as a reward for having done so. . . . to preserve and support religion-oriented institutions." *Sloan v. Lemon*, 413 U.S. 825, 832, 93 S.Ct. 2982, 2986, 37 L.Ed.2d 939 (1973). We are well aware that we are not dealing with secular textbooks or bus rides but with tax benefits for tuition payments to elementary and secondary institutions, some of which provide religious training along with secular education.

*Mueller*, 676 F.2d 1195, 1204 (8th Cir. 1982). But, then, the Eighth Circuit limited its review to a facial analysis, stating:

> [T]he Minnesota statute has not singled out a class of citizens for a special economic benefit. It is neutral on its face; and, under the facts presented here, we cannot reject this facial neutrality as mere window dressing.

*Mueller*, 676 F.2d at 1204.

The facial examination proffered by the Eighth Circuit will not suffice. A court confronted by the Establishment

Clause must look to the practical effects of the law in question. This Court, in *Nyquist*, measured the degree of scrutiny required:

> [T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which either has the primary effect that advances religion, or which fosters excessive entanglement between church and State. Accordingly, we must weigh each . . . aid provisions challenged . . . against these criteria of effect and entanglement.

*Nyquist*, 413 U.S. at 774.

*Mueller* purports even to distinguish *Nyquist* by noting that the Minnesota statute creates a "true tax deduction" which is passive in nature in that any benefit to religious education would be incidental and indirect rather than an affirmative grant, subsidy or reward. *Mueller*, 676 F.2d at 1205-6; See *Nyquist*, 413 U.S. at 790, n. 49. But, is the "effect," in substance, any different simply because a parent receives a tax deduction for tuition paid rather than a tax credit? Both provide the same monetary incentive, i.e., to send one's children to a sectarian school. In this regard, the Supreme Court observed in *Nyquist:*

> In practical terms there would appear to be little difference, for purposes of determining whether such aid as the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under §2. The qualifying parent under either system receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State.

*Nyquist*, 413 U.S. at 790-91.

In *Nyquist*, this Court was confronted with several sections of the "elementary and secondary education opportunity program." Section 2 established a program of tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. Sections 3, 4, and 5 of the challenged law were designed to provide tax relief in the form of a credit/deduction hybrid. In concluding that each section was unconstitutional, this Court found nothing constitutionally distinguishable between the tax credit versus the credit/deduction hybrid. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State. The tax deduction in this case, while varying between taxpayers, has the same calculated effect, "to reduce by an arbitrary amount the sum he would otherwise be obligated to pay over to the State." *Nyquist*, 413 U.S. at 790-91. The constitutionality of his tax benefit does not turn on the label accorded it. *Nyquist*, 413 U.S. at 789.

The Eighth Circuit places great importance on the fact that "all citizens" may reap benefits from this tax deduction. While this may be true facially, close scrutiny of the practical application of this statute leads to the inevitable and unalterable conclusion that the "primary effect" of this statute is to provide tax benefits for parents whose children attend parochial schools.

Without question, the most significant expense to be incurred by parents in the education of their school children in sectarian schools is tuition. Minnesota, like other states, has legislatively declared that public elementary and secondary education will be provided to its citizens free. Minn.

Stat. §120.72 (1982). Similarly, Minnesota prohibits the assessment of charges by public schools for most, if not all, of the items defined as textbooks under Section 290.09 (22). Minn. Stat. §120.74, subd. 1 (1982). This leaves parents of public education students with deductions only for the minimal expense of pencils, paper, tennis shoes, etc. as deductions under Section 290.09(22). In contrast, nonpublic education is not free. The parents must pay for items such as: tuition, textbooks, workbooks, art materials, laboratory supplies, pencils, paper, tennis shoes. Clearly, parents of students attending nonpublic schools will have much higher expenses than the parent whose children attend public schools. It is further uncontroverted that over 95% of the children attending nonpublic schools in Minnesota are enrolled in schools which are religiously affiliated. For the 1978-1979 school year, 96.29% of the nonpublic school children attended religious schools and the following year, this figure was 95.44%. *Mueller v. Allen,* 676 F.2d 1195, 1198 (8th Cir. 1982). While facially the challenged statute may appear to provide tax benefits to "all citizens," clearly the primary and overwhelming benefit will inure to those parents whose children attend parochial schools. As in *Nyquist,* "[I]t takes little imagination to perceive the extent to which States might openly subsidize parochial schools. . . ." *Nyquist,* 413 U.S. at 779.

The Minnesota *Amicus Curiae* are keenly aware of the constant pressure upon public school budgets and the total reliance by both elementary and secondary levels upon state aid (distributed on a formula basis in Minnesota). Persistent inflation and declining enrollments have accentuated these pressures resulting in school consolidations and teacher layoffs. One of the manifestations has been renewed ef-

forts by the secular schools to dip even more into the State's purse. As recently as the 1981-82 session of the Minnesota Legislature, bills were introduced in both the House of Representatives and the Senate designed to increase the maximum deduction amount in Minn. Stat. §290.09(22) from $500 and $700 to $1,000 and $1,400, respectively. *H.F.* 242 and *S.F.* 318, 72d Minnesota Legislature (1981). Inevitably efforts will be made at the federal level to enact similar tax devices. Judicial sanction of this tax device will lead to even greater entanglement and further subsidy of parochial schools by both state or federal governments.

The Eighth Circuit's analogy to charitable contribution deductions allowed under I.R.C. §170 is simply a distraction. Whether this Court has ruled upon the constitutionality of such charitable deductions is immaterial. That question is not before the Court and need not be decided. See, e.g. *Solesbee v. Balkcom*, 339 U.S. 9, 11, reh. den. 339 U.S. 926 (1949). The payment of tuition differs substantially from a charitable contribution. Charitable contributions are derived from a detached and disinterested generosity and not from the anticipation of economic benefits. Tuition payments, in essence, are the purchase of services. See *Winters v. Comm. Internal Revenue*, 468 F.2d 778 (2d Cir. 1972).

### C. IF SUFFICIENCY OF STATISTICAL EVIDENCE DOUBTED, SUMMARY JUDGMENT MAY BE INAPPROPRIATE.

In light of *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 855 (1st Cir. 1980), the record in this case is more than adequate to provide the factual basis upon

which the unconstitutionality of the challenged statute can be established. Faced with identical facts, established after a full hearing the trial court "drew the reasonable inference that 'the overwhelming majority of parents eligible for the challenged tuition deduction send their children to sectarian schools.' . . . [and that] the Rhode Island tuition deduction would confer a tax benefit along nearly solid sectarian lines." [Citations omitted.] *Norberg*, 630 F.2d at 859-60.

The trial court in *Mueller* appears to have disregarded the attacks by respondents upon petitioners' evidentiary affidavits[1], *Mueller v. Allen*, 514 F.Supp. 998, 999 (D. Minn. 1981). Thereafter, the trial court, in its memorandum opinion discussed at length petitioners' statistical analysis. However, in its conclusion, Judge Renner stated, for the first time: "Plaintiffs' statistical argument lacks credibility by reason of omissions of serious significance." *Mueller*, 514 F.Supp. at 1002-03. This concern was echoed by the Eighth Circuit. The trial court's concluding comment strongly suggests that indeed there may have been genuine issues as to material facts. If such were the case, then disposition of this matter by summary judgment clearly was inappropriate and premature. Fed. R. Civ. P. 56; *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The First Circuit questioned the precedential value of *M.C.L.U. v. Roemer*, 452 F.Supp. 1316 (D. Minn. 1978) because of an insufficient factual basis. *Norberg*, 630 F.2d at 861. Assuming the statistical omissions, which the trial

[1]There is ambiguity in the District Court's statement, "There may well be merit to defendants' objections [regarding plaintiffs' affidavits], but for purposes of this opinion, they are not being considered." It is unclear whether the District Court was not giving further consideration to the objections or the affidavits themselves.

court viewed as being of serious significance, are material, an incomplete factual record, made in the absence of an evidentiary hearing, could undermine the precedential value which the Supreme Court's decision in this case might otherwise have.

If such factual disputes were to exist, it would appear, also, that the Eighth Circuit failed to observe Rule 56's mandate. In *Walling v. Fairmont Creamery Co.*, 139 F.2d 318, 322 (8th Cir. 1943), the Circuit Court stated:

> On a motion for summary judgment the burden of establishing the non-existence of any genuine issue of fact is upon the moving party, all doubts are resolved against him, and his supporting affidavits and depositions, if any, are carefully scrutinized by the Court. . . . on appeal from an order granting a defendant's motion for summary judgment the Circuit Court of Appeals must give the plaintiff the benefit of every doubt.

Under such presumed circumstances, the Court should remand this case to the District Court with directions to require a full evidentiary hearing and to render, along with its reasoned decision, a full set of findings. Thus, facts necessary to reach a decision regarding the primary effect of the challenged statute may be established.

## CONCLUSION

A strong public education system is essential to the continued success of our democratic society. The cornerstone of our democracy is a well-educated populace. Continuing efforts to divert revenue from public elementary and secondary schools is cause for alarm. While nonpublic elementary and secondary schools will remain as an alternative for

the individual, diverting revenue from public education to support nonpublic, primarily religious schools is not only detrimental to our public education system, it violates the concept of separation of church and state. This Court in *Nyquist* involving New York tax legislation held unconstitutional a statute according tax benefits to parents who paid tuition for children attending parochial schools. In *Norberg* the First Circuit, with nearly an identical tax statute and statistical evidence, concluded that the primary effect was to confer tax benefits along sectarian lines to parents sending their children to parochial schools. The Minnesota *Amicus Curiae* urge this Court to find Minn. Stat. §290.09 (22) unconstitutional and enjoin its further enforcement. The decision of the Eighth Circuit should be reversed with directions to enter judgment in favor of the petitioners.

Respectfully submitted,

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